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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re application of	)	
	)	
MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.	)	File No. _____
	)	
For a Nationwide Narrowband PCS License Following Award of Pioneer's Preference	)	
	)	
In the matters of	)	
	)	
Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services	)	Gen. Docket No. ~~90-314~~ ET Docket No. ~~92-100~~ File No. PP-37
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	Gen. Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. ~~93-253~~
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266

To: The Commission

REPLY

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America ("BellSouth") hereby reply to the Opposition of Mobile Telecommunication Technologies Corp. ("Mtel") to BellSouth's Emergency Motion to Return Mtel's Application ("Motion"). Mtel's opposition was filed November 22, 1993 and further demonstrates that its application should be returned without processing.

Untimely Application. The fundamental issue raised by BellSouth is the premature nature of Mtel's application. BellSouth has shown that Mtel's filing is grossly

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premature.[1] Mtel received a pioneer preference which was predicated on its satisfaction of the basic qualifying and acceptability rules adopted for the service.[2] That determination cannot be made until rules are adopted. Mtel fails to explain why cannot wait for the Commission to adopt basic qualifying and other application processing rules specific to the Narrowband PCS service.

To deflect attention from this point, Mtel argues that BellSouth's filing is premature because the Mtel application has not yet been placed on public notice.[3] Mtel misses the entire point of BellSouth's filing. The Mtel application cannot even even be placed on public notice. There are no standards under which it can be reviewed. There are not even rules ensuring that the application will be placed on public notice.

Had BellSouth waited, the Commission might have granted the application without public notice, or it might have erroneously issued a public notice finding the application acceptable for filing. In either case, BellSouth would be required to ask the Commission to reconsider its decision. BellSouth filed an emergency motion because Mtel had filed its application without serving anyone, despite Mtel's own acknowledgement that many parties are interested in its preference award.[4] BellSouth's filing is timely.

No Headstart Permitted. Mtel contests BellSouth's statement that processing the Mtel application before other narrowband applicants violates the Commission's assurance

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[1] Mtel states omnisciently that its application conforms to the most stringent regulations which the Commission could adopt in the various pending proceedings. Mtel Opposition at 4.

[2] *Pioneer's Preference Order*, 6 FCC Rcd. 3488, 3492, 3493 (1991).

[3] Mtel Opposition at 2.

[4] *Id.* at 1-2, nn. 2-3.

that pioneer preference winners would receive no Commission-aided headstart. Mtel argues that processing must begin on its application now because frivolous challenges will be filed while other narrowband applicants will receive fast-track processing through the auction procedure.[5/]

All narrowband selectees will have to undergo the petition to deny process. This is required by statute, if narrowband PCS is found to be a common carrier mobile service or a commercial mobile service.[6/] Whatever qualifications and acceptability rules are adopted will apply equally to all narrowband applicants. Thus, narrowband auction winners can have no particular advantage over Mtel. As BellSouth stated in the Motion, processing Mtel's application before other narrowband applicants can even file their applications violates the Commission's express ruling "not to provide a headstart for the pioneering entity beyond the *de facto* headstart that may occur due to the time it may take other entities to apply for and receive a license."[7/] The Commission concluded that "to go beyond this and guarantee the pioneer a temporary service monopoly would not appear to be justified at this time."[8/]

5/ *Id.* at 7-8.

6/ *See* 47 U.S.C. § 309(b) and (c).

7/ *Pioneer's Preference Order*, 6 FCC Rcd. at 3492.

8/ *Id.* Mtel states that "the appropriate resolution to competitive headstart concerns is not returning or refusing to process Mtel's application, but rather delaying the ultimate grant of operating authority." Mtel Opposition at 8. BellSouth disagrees. The Commission has appropriately decided *not* to give an artificial time advantage to the preference winner. Its application should be filed at the same time as the others. It is overreaching in the extreme for Mtel not only to accept a preference award, but also to seek an exemption from the relatively modest requirements imposed on the preference winner, such as awaiting the proper time for filing and processing of its application.

Inappropriate Waiver Request. Mtel inexplicably maintains that *Northeast Cellular Telephone Co. v. FCC*,[9/] supports a blanket waiver here even before rules are adopted. Mtel quotes from *Northeast* that waivers are appropriate if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[10/] The Court's decision, however, provides further that

> waivers must be founded upon an appropriate general standard. . . . [S]ound administrative procedure contemplates waivers . . . granted only pursuant to a relevant standard . . . [which is] best expressed in a rule that obviates discriminatory approaches.[11/]

Mtel understandably avoids addressing the Court's admonishment that there must be standards if waivers are to be granted. Mtel also fails to address the fact that the Court in *Northeast* reversed the Commission's grant of a waiver because there were no articulated standards. The Court characterized the Commission's waiver decision as "outrageous, unpredictable, and unworkable policy that is susceptible to discriminatory application." 897 F.2d at 1167.[12/]

Clearly, a blanket waiver for Mtel of rules not yet adopted falls into the same category. Mtel is asking the FCC to waive any and all rules, including those that have not yet been adopted. By definition, if the Commission has not yet adopted the rules, it has never established the standards for waiver.

9/ 897 F.2d 1164, 1166 (D.C. Cir. 1990).

10/ Mtel Opposition at 6, *quoting Northeast*, 897 F.2d at 1166, citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

11/ 897 F.2d at 1166, *quoting WAIT Radio v. FCC*, 418 F.2d at 1159 (internal quotation marks omitted).

12/ Equally applicable here is the Court's criticism that "the FCC has not simply deviated from exemption standards; it never stated any standards in the first place." 897 F.2d at 1167.

Ex Parte. Mtel charges BellSouth with "casually" accusing it of violating the *ex parte* rules.[13/] BellSouth made no such accusation.[14/] Mtel misunderstands the term *ex parte*. BellSouth merely noted -- quite correctly -- that the pioneer's preference was a restricted proceeding and that Mtel filed its application *ex parte* (*i.e.*, without serving others).[15/]

Nevertheless, BellSouth was surprised that Mtel did not serve it with a copy of the application, since the application was filed while the restricted preference award proceeding remained subject to reconsideration and judicial review.[16/] The Commission has acknowledged the close linkage of a preference award to the subsequent application and license award. It has characterized the preference award as an "effective[] guarantee" of a license grant.[17/] As indicated above, Mtel's failure to serve prompted BellSouth to file its Emergency Motion.

Violation of Section 99.11. BellSouth pointed out that Mtel's filing for a specific Dallas site violated the one narrowband PCS acceptability rule that does exist -- Section 99.11 of the Rules. Mtel criticizes BellSouth for "misstating the intent" of Section 99.11

13/ Mtel Opposition at 8 n.18.

14/ Mtel also states BellSouth has speciously argued that consideration of its application will prejudge the Part 22 rulemaking. *Id.* at 8-9. BellSouth made no such claim.

15/ BellSouth Motion at 5.

16/ Mtel claims that a June 15, 1992 Public Notice establishes that applications are treated separately from pioneer's preferences for *ex parte* purposes. In fact, the Public Notice does *not* draw any such distinction. *See* Public Notice, "Ex Parte Presentations Relating to Requests for Pioneer's Preferences," DA 92-770 (June 15, 1992) (copy attached).

17/ *Pioneer Preference Order*, 6 FCC Rcd. at 3492.

of the rules and engaging in a tortured misreading of its application.[18/] Mtel admits, however, that its application did indeed propose an individual site. Section 99.11(b) plainly states that: "Applications for individual sites are not needed and will not be accepted." A plain reading of the rule bars consideration of Mtel's application.

Based on the filings now before the Commission, BellSouth respectfully submits that the Mtel application must be summarily returned.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.
BELLSOUTH CELLULAR CORP.
MOBILE COMMUNICATIONS CORPORATION OF AMERICA

By: _____
William B. Barfield
Jim O. Llewellyn

1155 Peachtree Street, N.E.
Atlanta, Georgia 30367-6000

By: _____
E. Andrew Tollin
Michael Deuel Sullivan

Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141

By: _____
Charles P. Featherstun
David G. Richards

1133 21st Street, N.W.
Washington, D.C. 20036
(202) 463-4132

Their Attorneys

December 3, 1993

18/ Mtel Opposition at 3 n.4.

Certificate of Service

I, Mary Jane Adcock, hereby certify that on this 3rd day of December, 1993, copies of the foregoing "Reply" were sent via First Class United States mail, postage prepaid, to the following:

*The Honorable James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

*The Honorable Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

*The Honorable Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

*Kathleen B. Levitz, Esq.
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

*Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

*Ralph A. Haller
Chief, Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, DC 20554

*Renee Licht, Esq.
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, DC 20554

*Robert M. Pepper
Chief, Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, DC 20554

*Dr. Thomas P. Stanley
Chief Engineer
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, DC 20554

*John Cimko, Jr., Esq.
Federal Communications Commission
1919 M Street, N.W., Room 644
Washington, DC 20554

*Myron C. Peck
Federal Communications Commission
1919 M Street, N.W., Room 644
Washington, DC 20554

R. Michael Senkowski, Esq.
Eric W. DeSilva, Esq.
Wiley, Rein and Fielding
1776 K Street, N.W.,
Washington, DC 20036

Thomas J. Casey, Esq.
Skadden Arps Slate Magher & Flom
1440 New York Avenue, N.W.
Washington, DC 20005

David L. Nace, Esq.
Lukas McGowan Nace & Gutierrez
1819 H Street, N.W., 7th Fl.
Washington, DC 20006

Harold Mordkofsky, Esq.
Blooston Mordkofsky Jackson & Dickens
2120 L Street, N.W.
Washington, DC 20037

Schwartz Woods & Miller
1350 Connecticut Avenue, N.W.
Suite 300
Washington, DC 20036

Carl W. Northrop, Esq.
Bryan Cave
700 13th Street, N.W.
Washington, DC 20005

Judith St. Ledger-Roty, Esq.
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, DC 20036

Matt Edwards
President, Skycell Corp.
116 Gray Street
Clemens Center
P.O. Box 1259
Elmira, NY 14902

James L. Wurtz
Pacific Bell
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

Phillip L. Spector, Esq.
Paul, Weiss, et al.
1615 L Street, N.W., Suite 1300
Washington, DC 20036

Lawrence J. Movshin, Esq.
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Washington, DC 20006

Mary Jane Adcock

* By Hand